

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2027

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALBERT MASCOLO,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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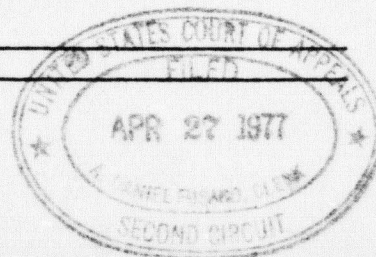


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ISSUE PRESENTED

Whether the court below properly denied appellant's motion to vacate his sentence on the ground that the sentence was based on allegedly false and extraneous information contained in the presentence report, where the sentencing judge expressly denied any reliance on the challenged information in imposing sentence.

INTRODUCTION

This is an appeal from an order of the United States District Court for the Eastern District of New York (Bartels, J.) denying appellant Mascolo's motion to vacate, correct, or set aside his sentence pursuant to 28 U.S.C. 2255.^{1/}

STATEMENT

1. After a jury trial in the United States District Court for the Eastern District of New York, appellant Albert Mascolo and a co-defendant, Louis Epifania, were convicted of conspiring to distribute heroin (Count I), in violation of 21 U.S.C. 841(a)(1) and 846, and of possessing heroin with the intent to distribute it (Count II), in violation of 21 U.S.C. 841(a)(1). On June 8, 1973, the trial judge, the Honorable John R. Bartels, sentenced Mascolo on each count to concurrent terms of five years imprisonment, pursuant to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2) [amended, Pub. L. 94-233, 90 Stat. 219, March 15, 1976, current version at 18 U.S.C. 4205(b)], to be followed by a special parole term of seven years.^{2/} This court affirmed the conviction without opinion. United States v. Mascolo, 486 F.2d 1397 (1973), cert. den., 417 U.S. 909 (1974).

^{1/} The memorandum-decision and order of the district court is reproduced in the Appendix at pp. 3-11.

^{2/} Co-defendant Louis Epifania, was sentenced to a term of ten years imprisonment, to be followed by a special parole term of seven years. On August 9, 1975, Judge Bartels reduced Epifania's sentence of imprisonment from ten to nine years under Rule 35, F.R. Cr. P.

At sentencing, on June 8, 1973, Mascolo declined the opportunity to make a statement but authorized his counsel to speak in his behalf. Prior to the hearing Mascolo's counsel had been provided with an opportunity to examine the presentence report^{3/} (App. 14). In addition to making general arguments on behalf of a lenient sentence, Mascolo's counsel challenged one statement in the presentence report which characterized Mascolo as a "high level courier" in the narcotics business. He argued that the evidence showed that Mascolo had a lesser role in the operation (App. 16-17). The court provided Mascolo's counsel ample opportunity to make any additional comments, but counsel did not further refer to the report.^{4/} Judge Bartels did not specify the grounds on which the sentence was based, but in the course of his comments during the colloquy with Mascolo's

^{3/} The record does not establish whether appellant Mascolo had an opportunity to personally examine the report, or if he did so. Mascolo stated in his §2255 petition that he became aware of the contents of the report when he subsequently brought suit to protest his treatment at prison (App. 6).

^{4/} The Court stated to Mascolo's counsel (App. 7-8):

If you want to take more time, you do so because as long as it's become a question of repetition, I think you ought to feel free and relaxed, and I say that to all counsel for defendants in making their appeal before this Court because this is perhaps one of the most important days in the life of any defendant. So you feel free to make such appeals as you wish.

counsel, he stated that he was aware of Mascolo's testimony at trial, his background, and the need to protect society by deterring dealers in heroin and hardcore drugs (App. 3, 6).

2. On December 16, 1974, Mascolo, who was then incarcerated in a federal correctional institution in Connecticut, filed a petition seeking habeas corpus relief in the United States District Court for the District of Connecticut on the ground that he was improperly being denied certain institutional benefits.^{5/} In Mascolo v. Norton, 405 F. Supp. 523 (D. Conn. 1975), the petition was dismissed as moot because Mascolo had been provided with the benefits sought. In the course of its opinion in that case, however, the district court indicated that the Board of Parole had, in making its initial determination that Mascolo was a "Special Offender" ineligible for benefits, acted "without a rational basis in fact and without affording the inmate any procedural due process protections." 405 F. Supp. at 524. The court further indicated that in making this determination the Board of Parole had relied, in part, on an "unsubstantiated" hearsay

^{5/} Mascolo was released from custody in June, 1976. He will remain under parole supervision until 1985.

statement in the presentence report indicating that Mascolo had killed two persons, and on an unverified statement that he had been questioned by the police in regard to another killing. Id.

3. Subsequently, on May 4, 1976, Mascolo filed in the United States District Court for the Eastern District of New York a motion to vacate his sentence pursuant to 28 U.S.C. 2255 on the ground that it was based on material misinformation in his presentence report. Specifically, he claimed that the report contained one matter of misinformation -- i.e., three references to a statement by Dennis Weider, a government informant, to the effect that co-defendant Epifania had informed him that Mascolo had killed two unnamed individuals;^{6/} and also contained references to two extraneous matters -- a description

^{6/} The report described a meeting of Epifania and Wieder and stated:

During their conversations, which centered on the narcotics investigation in progress, Epifania reportedly indicated that he knew that "Al" had performed two "hit" jobs for him, whereupon Epifania gestered [sic] with his index finger as if pulling a trigger. The latter then allegedly cautioned Wieder that if he ever found that Wieder was the informer he would have him killed. App. 5, quoting Presentence Report at 8.

* * *

In addition, according to Wieder, Epifania at one time advised him that [Mascolo] killed two people

[footnote continued on next page]

of the death of one Michael Greco,^{7/} and a description of Mascolo's own statement that he was questioned by police in regard to another death but was found to have a verifiable alibi.^{8/} There was no mention in the report of any

[footnote continued]

on Epifania's orders. Id., quoting Presentence Report at 10.

* * *

According to Wieder, [Mascolo] has also reportedly murdered two individuals on instructions from Epifania. Id., quoting Presentence Report at 13.

7/ The presentence report described alleged narcotics transactions between Greco and Epifania and between Greco and John McMillan, an uncle of the government informant, and then stated:

Prosecution against Michael "Big Mike" Greco was abruptly halted in March 1973 when his dismembered body was delivered from Boston, Massachusetts, and deposited at an undisclosed location in New York City by as yet unknown individuals. The investigation of events surrounding his death continues. App. 5, quoting Presentence Report at 9.

8/ The presentence report contained the following:

[Mascolo] further advises that at the time that Johnson was killed in connection with the attempted murder of Joseph Columbo, he was questioned by local police as a suspect. He advises, however, that he had a verifiable alibi and that the inquiry was not pursued in his direction. App. 6, quoting Presentence Report at 11.

relationship between Mascolo and Greco, and the report did not allege that Mascolo was involved in Greco's killing. In his §2255 petition, Mascolo denied having any knowledge of the killings referred to in the report. He did not admit or deny that Epifania had made the statement to Wieder, nor did he deny the truth of the facts related in the report concerning Greco's death. Mascolo admitted being questioned by police as indicated in the report.

4. In a memorandum-decision and order filed on December 9, 1976, Judge Bartels, who had been the sentencing judge, denied Mascolo's §2255 motion without a hearing (App. 11). Judge Bartels stated that although he had read the presentence report, he had not relied on the allegedly prejudicial statements therein in imposing sentence (App. 3-4, 7):

To begin with, it must be pointed out that this court tried Mascolo's case and heard all the evidence, including the testimony of both Epifania and Mascolo. In this case it did not need to and did not actually rely on any prejudicial statements in the presentence report which did not come out at trial, although it naturally read the presentence report. The offense was sufficient in itself to more than justify the sentence imposed. . . .

* * *

In the case at bar, sentence was pronounced on the basis of the guilty verdict of a serious offense and not upon any false conceptions of the defendant's record, which under the circumstances were immaterial to the court's determination of punishment.

Noting Mascolo's reliance on Mascolo v. Norton, supra, Judge Bartels further explained that it was "wholly unjustified" to jump to the conclusion that his reliance on the presentence report was the same as that of the prison authorities (App. 7). Judge Bartels went on to observe that the hearsay nature of Wieder's statement was apparent from the record (App. 8), and that it was the court's belief "that Mascolo's former counsel was silent [at the sentencing hearing] on all of the points [now raised in the §2255 motion] because he, like the court, realized their utter immateriality to the sentencing process under the circumstances" (App. 7).

ARGUMENT

SINCE IN IMPOSING SENTENCE THE
DISTRICT JUDGE DID NOT RELY ON
ANY OF THE STATEMENTS IN THE
PRESENTENCE REPORT NOW ALLEGED
TO BE IMPROPER, MASCOLO'S MOTION
TO VACATE HIS SENTENCE WAS PROPERLY
DENIED

1. Mascolo contends that he was denied due process at sentencing because the sentence imposed was based on "misinformation" and "material false assumptions" (see United States v. Malcolm, 432 F.2d 809, 819 (2nd Cir. 1970)). Specifically, he argues that his sentence should be vacated on the ground that he was sentenced on the basis of three specific matters of "misinformation and extraneous information" included in a defective presentence report (Appellant's Brief at 26), namely (as set forth above at pp. 5-7, supra),
(1) Wieder's statement that he had been told by Epifania that

Mascolo had killed two unnamed individuals, (2) information on the violent death of one Michael Greco unconnected to Mascolo and (3) a description of Mascolo's own statement that he had been questioned by police in regard to another murder and found to have a verifiable alibi.

The complete answer to this claim is that all relevant indicia firmly establish that the sentence imposed was not based in any way upon this allegedly improper information. In imposing sentence, Judge Bartels simply did not rely on the material in the presentence report of which Mascolo now complains.^{9/}

First, the record of the sentencing hearing reveals not a single reference to any of the matters of which Mascolo complains either by counsel or the court. Indeed while counsel urged error in certain language in the report, this involved no matter in issue here. And, counsel was in no way hindered in discussions challenging the report. As for the sentencing judge, while he did not at that time specify his reasons for

9/ It is noteworthy that Mascolo has failed to establish that any of the material in the presentence report was false. Mascolo did not even allege in his §2255 petition that any of these statements were in fact false (see App. 6-7). While he denied killing anyone, he did not deny that Epifania had made such a claim to Wieder. As for the death of Michael Greco, Mascolo did not deny that the facts asserted there were also true. Mascolo admitted the truth of the statements as to his questioning by police concerning the murder of an assailant of Joseph Columbo (motion to vacate, correct or set aside sentence, pp. 2-3).

the sentence he imposed, he did indicate that he was aware of Mascolo's testimony at trial, his background, and of the need to protect society through the deterrence of dealers in heroin and hardcore drugs. Moreover, in denying Mascolo's motion to vacate his sentence Judge Bartels expressly declared that he had not relied on the material complained of here, and that the sentence was instead based upon the seriousness of the offense (App. 3, 4, 7). Indeed, Judge Bartels observed that he believed that the material was not commented upon at sentencing because counsel, like the court, realized the "utter immateriality" of the information to the sentencing process (App. 7).

This finding by the court below is controlling here. See Ferranto v. United States, 507 F.2d 408 (2nd Cir. 1974); United States v. Stein, 544 F.2d 96 (2nd Cir. 1976). In Farranto the district court had denied a \$2255 petition which alleged that the sentencing court had improperly relied on a previous conviction in which petitioner had not been represented by counsel. Finding that the district court had erred in dismissing the petition on the ground that the claim had been previously adjudicated, this Court remanded the case to the district court, stating that "[i]f the district judge can state that the invalidity of this particular guilty plea had no effect on the sentence imposed, then the sentence should stand." 507 F.2d

at 409. Here, of course, the sentencing judge has already stated that the allegedly improper information had no effect on the sentence imposed, so the sentence should stand.

Similarly, in Stein, supra, the trial judge had imposed sentence under a misapprehension as to at least two material facts. This Court held that the district court erred in dismissing the defendants motion to correct the sentence without any findings, stating (544 F.2d at 102):

Here [the district judge] was faced with evidence not controverted by the Government to the effect that assumptions expressed by [the judge] at the time of sentencing with respect to material matters had been either partially or wholly incorrect. Under these circumstances the judge owed a duty either to explain that she had not been influenced by them

or, if she had been, to make findings of fact after examining the evidence, which might or might not require a hearing [emphasis added].

In this case, not only is there nothing in the record to indicate that the judge was under a misapprehension as to any material fact, but he explained in his decision that the parts of the presentence report now complained of by Mascolo were wholly immaterial to the sentencing process (App. 9). Accordingly, the court below acted properly in refusing to vacate Mascolo's sentence on this ground. See Ferranto v. United States, supra; United States v. Stein, supra;

Wilson v. United States, 534 F.2d 130 (9th Cir. 1976); United States v. Belle, 525 F.2d 25 (8th Cir. 1975); Crovedi v. United States, 517 F.2d 541 (7th Cir. 1975); United States v. Green, 483 F.2d 469 (10th Cir. 1973), cert. den., 414 U.S. 1071; McAnulty v. United States, 469 F.2d 254 (8th Cir. 1972), cert. den., 411 U.S. 949; see also United States v. Rosner, 2nd Cir. No. 76-644, decided February 1, 1977; United States v. Herndon, 525 F.2d 208, 210 (2nd Cir. 1975).

2. Indeed, from a practical standpoint, it is not at all difficult to understand why the sentencing judge did not rely on the statements complained of by appellant. As for the statement in the report that Wieder had informed government agents that Epifania had told him that Mascolo had killed two individuals, its unreliable hearsay nature was apparent on its face. In its memorandum-decision the court below noted that the admissibility of the information at trial had been seriously questioned and that the court was "fully aware of the hearsay nature" of the conversation (App. 10).^{10/} The other two statements complained of by Mascolo are not even alleged to be false,

^{10/} Of course, the court may consider hearsay statements at sentencing if it wishes to do so; "[a] sentencing judge's access to information should be almost completely unfettered in order that he may acquire a thorough acquaintance with the character and history of the man before [him]." United States v. Doyle, 348 F.2d 715, 721 (2nd Cir.), cert. den., 382 U.S. 843 (1965); United States v. Rosner, supra, slip op. at 1647 n. 5; see also 18 U.S.C. 3577.

merely irrelevant. The district court should not be presumed, without any basis in the record, to have materially relied on hearsay and irrelevant information merely because it is included in the presentence report. This Court must have "some confidence in the ability of the judge to deal with what is said in the report." United States v. Herndon, supra, 525 F.2d at 211.

3. The arguments of Mascolo are wholly wanting in substance (see Appellant's Brief at pp. 19-22).

Mascolo first asserts that the court below applied an improper standard "concerning reliance" on the presentence report. This argument stems from the court's discussion of the case law regarding the vacating of sentences on the basis of the record at sentencing. On this subject the court below stated that "demonstrable or clearly evidenced" reliance on misinformation must be shown (App. 8). Mascolo, quoting from United States v. Robin, 545 F.2d 775, 779 (2nd Cir. 1976), asserts that actual reliance on misinformation need not be shown, and that a sentence must be vacated if there is a "possibility" that the sentence was imposed on the basis of false information. Regardless of the applicable standard it is irrelevant here because the court below did not rest its decision on its assessment of the presentence report; rather, it found as a factual matter that there had been no reliance on any of the allegedly improper information, (App. 4), and thus properly refused to vacate Mascolo's sentence.

Mascolo further argues that the trial court's disclaimer of reliance should not be credited because it "conflicts with the theory of 'individualized' sentencing which underlies criminal sanctions" (Appellant's Brief at 19). It is difficult to understand why this is a reason to disbelieve the district judge's statement that he did not rely on the questioned information. In any event, a sentencing judge need not rely on every piece of information in the presentence report to impose an "individualized" sentence. This case provides a good illustration. Here the court presided over the trial of the case, heard Mascolo testify, and knew his general background from the other segments of the presentence report before he imposed sentence. This certainly provided a sound basis for imposing an "individualized" sentence.

CONCLUSION

It is therefore respectfully submitted that the order of the district court denying Mascolo's motion to vacate his sentence should be affirmed.

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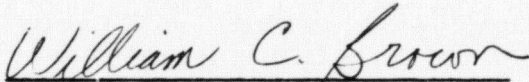
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing
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